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6	IN THE UNITED STATES DISTRICT COURT				
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8	FOR THE NORTHER	N DISTRICT OF CALIFORNIA			
9	UNITED STATES OF AMERICA,	No. CR 05-00567 JSW			
10	Plaintiff,	ORDER TO SHOW CAUSE			
11	V.				
12	SHAUN D. ROBERTS,				
13	Defendant.				
1.4		/			

On October 4, 2010, Shaun D. Roberts ("Roberts") filed a motion to vacate his sentence in this case, pursuant to 28 U.S.C. § 2255. (Docket No. 129.) On that same date, he filed a request to file a delayed brief, on the basis that he is in a special housing unit and does not have access to the law library. (Docket No. 130.) On November 2, 2010, the Court granted Roberts' request for an extension and directed him to file an amended motion by no later than December 9, 2010. The Court has received Roberts' amended motion under Section 2255, in which he claims that he is entitled to relief on the basis that: (1) this Court did not provide notice that it might impose a sentence above the range provided by the United States Sentencing Guidelines; (2) the sentence imposed was unreasonable; and (3) trial counsel failed to object to the determination that Roberts qualified as a "career offender."

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255. Thus, a hearing is required "whenever the record does not affirmatively manifest the factual or legal invalidity of the [movant's] claims." Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982) (citation omitted). "A hearing must be granted unless the movant's allegations, when viewed against the record, do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v.* Schaflander, 743 F.2d 714, 717 (9th Cir. 1984) (citations omitted).

Roberts raised the first two claims on direct appeal, and the Ninth Circuit has affirmed this Court's decision. See United States v. Roberts, 2009 WL 166491 (9th Cir. Jan. 26, 2009). Claims presented and rejected on direct appeal may not be litigated again in a Section 2255 motion. See United States v. Scrivner, 189 F.3d 825, 828 (9th Cir. 1999) (appellate court decision rejecting claim was binding on court considering § 2255 motion). Accordingly, the Court finds that Roberts is not entitled to relief on those claims, and the motion is denied in part on that basis.

Roberts also, however, contends that his counsel was ineffective for failing to object to his status as a career offender. Liberally construed, this claim appears potentially colorable under Section 2255 and merits an answer from the Government.

CONCLUSION

For the foregoing reasons and for good cause shown:

- 1. The clerk shall serve by certified mail a copy of this order and the motion and all attachments thereto upon the Office of the United States Attorney. The clerk shall also serve a copy of this order on Roberts.
- 2. Respondent shall file with the court and serve on Roberts, within 30 days of the date of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2255 Proceedings, showing cause, on the limited issue set forth above, why the Court should not "vacate, set aside or correct the sentence" being served by Roberts.

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Cas	e 3:05	6-cv-00567-WHA	Document 30	Filed 12/20/10	Page 3 of 4
	3.	If Roberts wishes	to respond to the	answer, he shall o	do so by filing a reply with
the cou	rt and	serving it on Respo	ondent within 30 c	days of his receipt	of the answer.
	IT IS	SO ORDERED.			
Dated:	Dece	mber 20, 2010		JEFFREY 8	Huy Swhite
				UNITED S	TATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT 1 2 FOR THE 3 NORTHERN DISTRICT OF CALIFORNIA 4 USA et al, 5 Case Number: CR05-00567 JSW Plaintiff, CERTIFICATE OF SERVICE 6 v. 7 ROBERTS et al, 8 Defendant. 9 10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California. 11 That on December 20, 2010, I SERVED a true and correct copy(ies) of the attached, by placing 12 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery 13 receptacle located in the Clerk's office. 14 **Shaun Roberts** 15 #93235-111 **USP** Canaan 16 PO Box 300 Waymart, PA 18472 17 Dated: December 20, 2010 18 Michard W. Wieking, Clerk By: Jennifer Ottolini, Deputy Clerk 19 20 21 22 23 24 25 26 27